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IN THE

Supreme Court of the United States

OFFICE OF THE CLERK

At a _____ Term, 1999

CONCORDE-NEW HORIZONS, CORP.,

Petitioner,

v.

SHOPTALK, LTD., ALAN MENKEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether, under the Copyright Act of 1909, the publication of a derivative work motion picture also serves to "publish" the written, unpublished screenplay upon which the motion picture is based and thereby divests the screenplay of its common-law copyright protection to the extent it is disclosed in the derivative work, replacing common-law copyright protection for the disclosed material with the derivative work's statutory copyright.

B. Whether statutory copyright protection of a derivative work motion picture is limited to the new matter added or, instead, also covers pre-existing material present in the underlying work.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court below were the parties appearing in the caption of the case. Defendant-Counterclaimant-Appellee-Cross-Appellant, Concorde-New Horizons Corp. has no corporate parents, subsidiaries or affiliates that are publicly held.

Upon information and belief, Plaintiffs-Counterdefendants-Appellants-Cross-Appellees, Shoptalk, Ltd. and Allen Menken, have no corporate parents, subsidiaries or affiliates that are publicly held.

The United States Copyright Office appeared as amicus curiae, represented by the office of the United States attorney for the Southern District of New York.

Mr. James Niss filed a brief as amicus curiae, pro se.[1]

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[1] Copies of the petition are being served upon the Amici and, pursuant to Rule 29 service is also being made upon the Solicitor General of the United States.

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Petitioner, Concorde-New Horizons Corp., respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case, entered February 4, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit was filed February 3, 1999 (1998 U.S. App. Lexis 1416), and is reprinted in the Appendix hereto, at 13a - 30a.

The opinion of the United States District Court for the Southern District of New York, which ordered plaintiffs to pay defendant unpaid copyright royalties plus interest for the use of material in a motion picture screenplay and to pay future royalties until expiration of the copyright in the screenplay, is reported at 897 F.Supp. 144, and is reprinted in the Appendix hereto, at 4a - 12a.

JURISDICTION

Plaintiffs, Shoptalk, Ltd. and Allen Menken, brought suit in the United States District Court for the Southern District of New York, seeking a declaratory judgment that they had no continuing obligation to pay certain domestic royalties to the defendant, Concorde-New Horizons Corp., under an agreement dated May 27, 1983. The defendant counterclaimed for breach of contract, copyright infringement, unjust enrichment and for an accounting, premised upon the May 27, 1983 agreement. Jurisdiction existed under 28 U.S.C. §1332 (a), as the action involved the

controversy between citizens of different states; and under 28 U.S.C. §1338, as the controversy involved a Federal question under the Copyright Act of 1909.

Plaintiffs appealed and the defendant cross-appealed from the judgment of the District Court, entered September 15, 1997. Jurisdiction of the United States Court of Appeals for the Second Circuit was pursuant to 27 U.S.C. §1291.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Sections of the Copyright Act of 1909, 17 U.S.C. §1, et seq., and the Copyright Act of 1976, 17 U.S.C. §101, et seq. The 1909 Copyright Act is reprinted in the Appendix hereto.

Section 7 of the 1909 Act states, in pertinent part:

> Compilations or abridgements, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this title; *but the publication of any such new works shall not effect the force or validity of any subsisting copyright upon the matter employed or any part thereof*, or be

> construed to imply an exclusive right to such use of the original works, *or to secure or extend copyright in such original works.* (emphasis supplied)

STATEMENT OF THE CASE

INTRODUCTION

The fundamental question in this case is whether, under the Copyright Act of 1909, the statutory copyright protecting a derivative work motion picture is limited to the new material in the derivative work; or whether publication of the derivative work constitutes publication of the previously-unpublished underlying screenplay, divesting the screenplay, to the extent incorporated into the derivative work, of its common-law copyright protection and subjecting it to the limitations and conditions applicable to the derivative work's statutory copyright.

BACKGROUND

Plaintiffs, Shoptalk, Ltd. ("Shoptalk") and Allen Menken ("Menken"), appealed to the United States Court of Appeals for the Second Circuit from a judgment of the United States District Court for the Southern District of New York (Batts, D.J.) which had ordered plaintiffs to pay to defendant, Concorde-New Horizons Corp. ("Concorde"), sums representing unpaid royalties for the use of material in a motion picture Screenplay and to pay future royalties until expiration of the screenplay's copyright, all pursuant to an agreement dated May 27, 1983 ("1983 Agreement").

The Screenplay entitled, "The Little Shop of Horrors", had been authored by Charles Byron Griffith ("Griffith") in 1959. In 1960, a Motion Picture entitled "The Little Shop of Horrors", was produced, based upon the Screenplay. The Screenplay was registered for copyright protection in 1982, pursuant to an application identifying it as an unpublished work. The Motion Picture was registered for copyright protection in 1985, with the application therefore identifying the Motion Picture's date of first publication as January 5, 1960.

Defendant, Concorde, is the successor-in-interest to Millennium films, Inc. ("Millennium"), which owned the rights and title to the Motion Picture. In 1983, Griffith jointly assigned to himself and Millennium the copyright to the Screenplay and all rights thereunder. Thus, Concorde owned the copyright to the Motion Picture and, jointly with Griffith, the copyright to the Screenplay.

Plaintiff Menken composed the music to an off-Broadway musical play based upon the Screenplay and the Motion Picture. The book and lyrics to the musical play were authored by the late Howard Ashman ("Ashman"). Plaintiff Shoptalk is the assignee of Ashman's rights and obligations in regard to the book and lyrics of the musical play.

In 1982, Griffith had commenced suit in the United States District Court for the Southern District of New York against various parties responsible for the musical play. The defendants in that action impleaded New World Pictures, Inc., the predecessor-in-interest to Millennium, which, in turn was the predecessor-in-interest to Concorde. The suit alleged the defendants had infringed upon the Screenplay copyright. The

1982 litigation was settled in 1983, when the parties executed a settlement agreement that had been drafted May 27, 1983 in contemplation of that settlement. Menken and Ashman were signatories to the 1983 Agreement.

Pursuant to the 1983 Agreement, plaintiff Shoptalk's predecessor-in-interest and plaintiff Menken obtained the right to produce the musical play using material contained in the Screenplay and the Motion Picture, plus certain subsidiary rights, in consideration for which royalties were to be paid to Millennium and to Griffith. The Agreement, also provided that the owner of the "work" (referring to the Motion Picture) would take the steps necessary to extend the applicable statutory copyright. It was further provided that, if the owner failed or neglected to do so, the defendants in the 1982 action (plaintiffs in the present action) had the right to do so, including the right to execute the necessary document and to act as the owner's irrevocable attorney-in-fact. The Agreement did not provide for any "penalty" if the owner failed to renew the Motion Picture copyright. Specifically, royalty payments were not made expressly contingent upon the movie copyright.[2]

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[2] The defendant in the present action had taken the position that the plaintiffs received valuable consideration under the 1983 Agreement for the continued payment of royalties even in the absence of a renewed copyright in the Motion Picture in that, through the agreement which ended the 1982 suit, the plaintiffs herein obtained the immediate right to produce their musical play free of litigation, a significant benefit to them since the musical play already had been performed without permission and continued litigation jeopardize the production and could have led to significant monetary losses. Plaintiffs herein also obtained.

Pursuant to the Copyright Act of 1909, as amended in 1947, renewal of the Motion Picture copyright was required at the expiration of an initial 28-year term, which related back to the 1960 publication of the Motion Picture. The parties to the 1983 Agreement failed to renew that copyright in 1988, as a consequence of which the Motion Picture entered the public domain on or about January 1, 1989.

Plaintiffs in the present litigation admitted that at some time prior to 1991, they discovered that the Motion Picture copyright had not been renewed. Although that non-renewal was the basis for their argument that the Screenplay had entered the public domain along with the Motion Picture in January of 1989 and, thus, no further obligations were owed under the 1983 Agreement, plaintiffs nevertheless commenced suit against the defendant in the United States District Court for the Central District of California in May of 1992 to enforce their exclusivity rights pursuant to the 1983 Agreement. No issue was raised by plaintiffs with regard to the validity of the 1983 Agreement or of the Screenplay copyright. The 1992 litigation was resolved by settlement in May of 1993.[3]

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[3] During the course of the 1992 California litigation, plaintiffs withheld royalty payments, which they asserted was done as an additional measure to force compliance with the 1983 Agreement as part of the litigation. Only after resolution of the 1992 litigation did plaintiff's counsel advise that the monies were being withheld based upon the non-renewal of the Motion Picture copyright. The royalties were withheld, however, only as to Concorde. Plaintiffs continued to pay royalties to Griffith, joint owner with Concorde of the Screenplay copyright.

PROCEEDINGS BELOW

In July of 1993, plaintiffs commenced the instant suit in the United States District Court for the Southern District of New York, seeking a declaration that both the Motion Picture and the Screenplay had entered the public domain and plaintiffs' obligation to pay royalties terminated on or about January 1, 1989. Plaintiffs also sought re-payment of any royalties that had been paid to defendant Concorde after January 1, 1989. The defendant counter-claimed for various items of relief, including a declaration that plaintiffs are bound by the terms and conditions of the 1983 Agreement and still be obligated to pay royalties to the defendant as set forth in the Agreement. The defendant also sought the payment of any royalties that had been withheld by plaintiff.

The respective parties moved for summary judgment. Both motions were granted in part and denied in part.

District Judge Batts found that the expiration of the copyright to the Motion Picture extinguished plaintiffs' obligations under the 1983 Agreement to the extent they were premised upon the license of the Motion Picture. However, Judge Batts further held that the Screenplay was not published by publication of the Motion Picture in 1960 and therefore, had not entered the public domain. Accordingly, the defendant was entitled to receive royalties premised upon the license of the Screenplay under the terms of the 1983 Agreement. Therefore, plaintiffs were required to pay all withheld royalty payments and to pay future royalties until expiration of the copyright in the Screenplay.

Plaintiffs appealed and defendant cross-appealed from the judgment of the District Court. Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the United States Copyright Office submitted a brief as amicus curiae, urging reversal of the District Court judgment. On February 3, 1999, the Second Circuit issued its opinion affirming in part, vacating and remanding in part the judgment of the District Court.

Citing the recent decision of the Ninth Circuit in *Batjac Productions, Inc. v. GoodTimes Home Video Corp.*, 160 F.3rd 1223 (1998)[4], the Second Circuit said that §7 of the Copyright Act of 1909 applies only to subsisting statutory copyrights and does not apply to works protected by common-law copyrights; that publication of a derivative work constitutes publication of so much of a previously-unpublished underlying work as is disclosed in the derivative work; and that publication of the Motion Picture in 1960 published also those portions of the Screenplay that were incorporated into the Motion Picture. The matter was remanded for further proceedings to permit the District Court to, inter alia, make a comparison of the two works in order to determine the extent to which the Screenplay was disclosed in the Motion Picture and thus was unprotected after the copyright in the Motion Picture was not renewed.

ARGUMENT

I. Certiorari Should Be Granted Because the Decision

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[4] Upon information and belief, a petition for certiorari has been filed in *Batjac*.

Below Conflicts with the Plain Meaning of §7 of the Copyright Act of 1909.

It is a basic principle of statutory interpretation that courts must give effect to the clear meaning of statutes as they are written. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S. Ct. 2589, 120 L. Ed.2d 379 (1992). Unless the words of a statute are otherwise defined within the statute itself, those words must be assumed to carry their ordinary, common meaning. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 109 S. Ct. 2166, 104 L.Ed.2d 811 (1989); *Burgo v. General Dynamics Corp.*, 122 F.3d 140 (2nd Cir. 1997), reh. den. 128 F.3d 801 (2nd Cir. 1997), cert. den. 118 S. Ct. 1839 (1998), cert. den. 118 S. Ct. 1839 (1998); *Skubel v. Fuoroli*, 113 F.3d 330 (2nd Cir. 1997); *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501 (2nd Cir. 1991).

The wording of §7 of the 1909 Copyright Act is clear and unambiguous:

> Compilations or abridgements, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this title; *but the publication of any such new works shall not effect the force or validity of any subsisting copyright upon the matter employed or any part thereof*, or be

> construed to imply an exclusive right to such use of the original works, *or to secure or extend copyright in such original works.* (emphasis supplied)

As a matter of statutory interpretation, the word "any", as part of the phrase "any subsisting copyright", must be given its broadest and most comprehensive meaning. See *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 115 (3d Cir. 1992), *cert. den.*, 507 U.S. 1005, 113 S.Ct. 1645, 123 L.Ed.2d 267 (1993). ["the word 'any' is generally used in the sense of 'all' or 'every' and its meaning is most comprehensive"; citing *McCormick v. Columbus Conveyor Co.*, 522 Pa. 520, 564 A.2d 907 (1989)]. The term "copyright", as defined by case law *prior* to the 1909 Act, embraced both "common law" and "statutory" copyright. See, e.g., *American Law Book Co. v. Chamberlayne*, 165 F.313, 317 (2d Cir. 1908). The words of the section, thus, given their common, ordinary meanings indicate that the section applies to *all* copyrights, including both common-law and statutory copyrights.

The section, moreover does not limit its application to "any subsisting statutory copyright", nor does it expressly exclude common-law copyrights. Congress clearly was aware of the distinctions between common- law and statutory copyrights and could have drafted §7 of the 1909 Act to contain limiting or exclusionary language if it had so intended. The lack of such language should be regarded as controlling. *Haas v. Internal Revenue Service*, 48 F.3d 1153, 1156 (11th Cir. 1995); *VJC Productions, Inc. v. Kydes*, 903 F. Supp. 42, 44 (S.D. Ga. 1995).

That pre-existing common-law copyrights are preserved under the Act and that publication of a derivative work does not necessarily extinguish pre-existing copyright protection, whether based upon statute or upon state common-law, in an underlying work is well-established. In *Roy Export Co. Estab. of Vaduz v. Columbia Broadcasting*, 372 F.2d 1095 (2nd Cir.), cert. den. 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed.2d 63 (1983), for example, the Second Circuit held that the creation and broadcast of a compilation of clips from Charlie Chaplin films may have been an "investing" publication so as to counter statutory protection to the collective work, but it was not a "divesting" publication so as to abrogate the existing common-law rights in the underlying works.

That pre-existing copyright protection in an underlying work can survive publication of a derivative work is a rational approach recognizing the differences that may exist between underlying and derivative works. A written screenplay, for example, may provide the basis for a derivative motion picture. However, regardless of the extent to which the screenplay is incorporated into the motion picture, the two works remain unique and independent. The screenplay relies exclusively upon the written word to convey all meanings and feelings of the story and is accessible whenever the reader chooses to turn the pages. A motion picture, meanwhile, exists on film and uses sound effects, music, stage settings, costumes, lighting and the skills and personalities of the actors involved to convey its meanings and feelings through an audio-visual presentation completely distinct from the written screenplay. Regardless of the similarities between the two, the underlying screenplay and

the derivative motion picture are not interchangeable.

For other cases recognizing underlying original works and derivative works as separate and distinct entities, see *White-Smith Music Publishing Company v. Apollo Company*, 209 U.S.1, 52 L.Ed. 655 (1907) [recognizing that sheet music and a musical roll for a player piano, the latter producing audible music, are distinct entities for copyright purposes]; *Gilliam v. American Broadcasting Companies*, 538 F.2d 14, 20 (2nd Cir. 1976) [" . . . the copyright in the underlying script survives intact despite the incorporation of that work into a derivative work"]; *Russell v. Price*, 612 F.2d 1123, 1128 (9th Cir. 1979), cert. den. 446 U.S. 952, 100 S.Ct. 2919, 64 L.Ed.2d 809 (1980) [reaffirming "the well-established doctrine that a derivative copyright protects only the new material contained in the derivative work, not the matter derived from the underlying work"].

The decision below recites that other sections of the 1909 Act, such as §10 and §13, use the words "copyright" and "subsisting . . . copyright" in ways that exclude common-law copyright. That may be correct, but the limitation on the words used in those sections is implicit in the overall language of the sections themselves. Section 10, for example, indicates the way in which any person entitled "by this title" can secure a copyright by publication of his work with the requisite notice. Section 13 deals with the necessity for depositing with the Copyright Office copies of a work for which a copyright has been obtained pursuant to §10 of the 1909 Act. The sections cited do no refer to "*any* subsisting copyright" because those sections clearly were drafted to apply to procedures specifically arising under the Act. No such

limitation is implicit in the wording of §7, which explicitly refers to the preservation of "*any* subsisting copyright" (emphasis supplied) without limitation to copyrights secured under the 1909 Act.

Section 2 of the 1909 Act is consistent with the interpretation of §7 urged by petitioner Concorde. Section 2 provides:

> Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefore.

Although this section, as noted by the Second Circuit, does not use the words "copyright" or "common-law copyright", the clear intent of the section is to provide continuing protection to the possessor of a common-law copyright against the unauthorized use of his work.[5]

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[5] In the decision below, the Second Circuit opined that the language of §3 of the 1909 Act, indicating that a copyright provided by the Act would not extend the duration of an already subsisting copyright, could only refer to a pre-existing statutory copyright since the common law copyright in an unpublished work then existed in perpetuity and could not be extended in any event. Therefore, the Court concluded, the language of §7 of the Act referred only to pre-existing statutory copyrights and would not include common law copyrights. To the contrary, the language of the sections is consistent with the position taken by petitioner

(continued...)

The distinction between an underlying work and a derivative work, a distinction erroneously ignored by the Second Circuit, is recognized in the Copyright Act of 1976, and 17 U.S.C. §101, et seq., which provides, at §103(b):

> The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, *any* copyright protection in the preexisting material. (emphasis supplied).

The underlying Screenplay in this case provided the

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[5](...continued)
Concorde herein. The language of §3 demonstrates that pre-existing common law and pre-existing statutory rights are to be placed on an equal footing: neither was to be extended, the former because it was not susceptible of extension and the latter because Congress determined it was not to be extended. Both rights, therefore, were to be preserved intact. The language of §7 quoted supra, also is consistent with the idea of treating pre-existing common-law and pre-existing statutory rights equally. While the language of the section indicating that publication of a new work "shall not effect the force or validity of any subsisting copyright.. . . or extend copyright in such original works" might not be strictly necessary if the section applied solely to subsisting common-law copyrights, it is necessary in a statute applicable to subsisting statutory as well as subsisting common law copyrights since it insures that all subsisting copyrights are afforded equal treatment.

framework for the derivative Motion Picture. No matter how closely that Motion Picture followed the Screenplay, however, the Motion Picture constitutes a unique, distinct work, achieving its unique status because it is the end product of a series of intertwined factors, including elements of the underlying Screenplay, camera angles, lighting, stage setting, etc., the latter of those elements completely absent from the underlying Screenplay. Moreover, the derivative work was produced in a medium -- film -- totally different from the medium in which the underlying Screenplay was recorded. Consistent with the language of the 1909 Act and the 1976 Act, the Screenplay and the Motion Picture must be treated as separate and unique works, each subject to its own copyright.

It is submitted, therefore, that the approach taken by the Second Circuit in this case is inconsistent with the intent underlying the Copyright Act of 1909 as revealed by the language of the Act and inconsistent with the recognized distinction between a derivative work and an underlying work.

II. The Decision Below is Inconsistent with the Decision of this Court in *Stewart v. Abend*

That the subsisting copyright in an underlying work is not abrogated by the publication of a derivative work was recognized by this Court in *Stewart v. Abend*, 495 U.S. 207, 110 S.Ct. 1750, 109 L.Ed.2d 184 (1990).

In *Stewart*, the author of several short stories assigned the right to make a motion picture based upon one of those stories. The author agreed also to renew the copyright for the

short story. A derivative movie was released. Thereafter, the author died before the short story copyright came up for renewal. His executor renewed the short story copyright and assigned the copyright for the renewal term to Abend. Abend sued the film's owners, alleging that their re-release of the film infringed his copyright. Abend claimed that the film owners' right to use the short story lapsed when the author died without renewing the copyright. The film's owners argued inter alia that a suit for infringement would not lie because any right that existed in the short story was extinguished by publication of the derivative film. The latter argument was rejected by this Court, which stated, in pertinent part:

> The text of §7 reveals that it is not "surplusage" . . . It does not merely stand for the proposition that authors receive copyright protection for their original additions. It also limits the effect of the publication of the derivative work on the underlying work . . . Nowhere else in the Act does Congress address the treatment to be afforded derivative works. The principle that additions and improvements to existing works of art receive copyright protection was settled at the time the 1909 Act was enacted, a principle that Congress simply codified in §7.

495 U.S. at 232.

Addressing a point[6] raised by the dissent in that case, the Court stated the following:

> The dissent attempts to undercut the plain meaning of §7 by looking to its legislative history and the substitution of the term 'publication' for 'copyright' in the force or validity clause. According to the dissent, that particular alteration and the proposed bill "made clear that it was the publication of the derivative work, not the copyright itself, that was not to 'affect the force or validity of the subsisting copyright' . . . the language changed was suggested only to ensure that the publication of a 'new compiled work' without proper notice, including smaller portions that had not previously published and separately copyrighted would not result in those sections moving into the public domain. . ."

495 U.S. at 233.

In its decision in *Batjac, supra*, the 9th Circuit treated the above language from *Stewart* as dictum or as a mistake. It is submitted that the language is neither. The Court was addressing a specific argument raised by the dissent. Even if it were dictum, it clearly was carefully considered language and therefore must be treated as authoritative. See, *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S.

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[6] The point raised related to the intent of Congress in changing the word "copyright" in the original bill to "publication in the final version of §7 of the 1909 Act.

221, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986).

Further belying the characterization of the language as a mistake is the fact that the conclusion was repeated at multiple points in the Court's decision. For example:

> If one reads the plain language of §7 and §3 together, one must conclude that they were enacted in no small part to ensure that the copyright in the pre-existing work would not be abrogated by the derivative work. Section 7 requires consent by the author of the pre-existing work before the derivative work may be produced, and both versions explicitly require that the copyright in the "subsisting work" will not be abrogated by incorporation of the work into another work.

In its decision in the matter at hand, the Second Circuit attempted to characterize *Stewart* as "inapposite, as it involved an underlying story protected by statutory copyright, not by common law." However, the decision of this Court in *Stewart*, *supra*, was not conditioned upon the fact that the underlying work in that case happened to be protected by a statutory copyright rather than one arising under common-law. There is no suggestion in the Court's opinion that the result might have been different if the underlying copyright had been one under common-law. Therefore, the purported distinction is invalid.[7]

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[7] In the decision below, the Second Circuit also incorrectly, we believe, rejected its own prior statement in *Gilliam*, *supra*, 538 F.2d at 20

(continued...)

Since a question has been raised as to the meaning of this Court's decision in *Stewart*, the issue should be addressed by the Court.

III. The Decision Below Is Based, in Part, upon an Unwarranted Concern over the Possibility of a Perpetual Copyright

The Decision of the Second Circuit was influenced by that Court's concern over the fact that common-law copyrights had no time limit. Citing the similar concern underlying the decision of the Ninth Circuit in *Batjac*, the Court stated:

> In *Batjac*, the Ninth Circuit ruled that publication of a motion picture publishes so much of the underlying screenplay as was disclosed in the motion picture. (internal citations omitted). The Court reasoned that a contrary rule will turn on its head the copyright principle of limited monopoly, in

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[7](...continued)

n.3:

> "In any event, we find that the same principles discussed below with respect to derivative works adopted from material in which there is a statutory copyright also apply to material in which there is a common law copyright (citations omitted)."

The language which follows, and which is cited in the opinion of the Second Circuit, appendix herein, seems to deal primarily with the question of whether (re-) broadcast of a previously recorded program constitutes publication (of the program) and the underlying script.

> that 'the copyright in any film that has entered the public domain under the 1909 Act could be resurrected by an unpublished screen play.' (internal citation omitted). We find this reasoning persuasive and consonant with the principles approved in our prior cases . . .

It is submitted that the Court's concern was misplaced. Adopting the position urged by petitioner Concorde would not "turn on its head the copyright principle of limited monopoly". That possibility is eliminated by the 1976 Act, 17 U.S.C. §101, et seq. Effective January 1, 1978, the 1976 Act eliminated common-law protection and substituted therefore statutory protection. Section 303 of the Act states, in pertinent part:

> (a) Copyright in a work created before January 1, 1978, but not thereafter in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302.[8] In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2007.

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[8] In general, §302 provides that a copyright endures for the life of the author, or the life of the last surviving author if the work is the product of multiple authors, plus 50 years from that life. 17 U.S.C. §302(a), (b).

The problem of the undesirable perpetual monopoly, created by the common-law copyright, thus, does not exist. Interpreting §7 of the 1909 Act according to its plain meaning, as urged by petitioner Concorde, cannot now operate to create the perpetual monopoly which concerned the Second Circuit in this case and the Ninth Circuit in *Batjac*. Nor could such interpretation of §7 resurrect the copyright in a work that previously had entered the public domain since, by its express terms, §303 of the 1976 Act does not apply to any work already in the public domain prior to the Act's effective date. The position urged by petitioner Concorde, thus, does not conflict with the "limited Times" provision of the Constitution.[9] To the extent the decision below was based upon the spectre of a perpetual copyright, that decision is without foundation.

Indeed, if the unlimited term of common-law copyrights *was* a problem prior to the 1976 Act, the very existence of that problem supports the position of petitioner Concorde as it shows that the 1909 Act recognized the continued viability of copyrights existing under common-law as well as statutory rights. The House Report on the 1976 Act, comments in pertinent part as follows, as to the impact of the Act:

> Theoretically, at least, the legal impact of section 303 would be far reaching. Under

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[9] "To promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries". United States Constitution, Article I, §8 cl. 8.

> it, every "original work of authorship" fixed in tangible form that is in existence would be given statutory copyright protection as long as the work is not in the public domain in this country. The vast majority of these works consist of private material that no one is interested in protecting or infringing, but section 303 would have still practical effects for a prodigious body of material already in existence.
>
> Looked at another way, however, section 303 would have a genuinely restrictive effect. *Its basic purpose is to substitute statutory for common law copyright for everything now protected at common law, and to substitute reasonable time limits for the perpetual protection now available. . . .* {emphasis supplied).

Identical language is incorporated into the Senate Report on the 1976 Act.

Effective January 1, 1978, the 1976 Act ended the era of the common-law copyright. *Roy Export Co. Estab. of Vaduz v. Columbia Broadcasting, supra,* 672 F.2d at 1097. Until that time, the common-law copyright existed. It existed prior to the 1909 Act. Since common-law copyrights were preserved under the 1909 Act, they maintained their validity after the 1909 Act went into effect. If the unlimited duration of the common-law copyright represented a constitutional problem, Congress addressed that problem in drafting the 1976 Act, implicitly recognizing the preservation of common-law copyrights under the 1909 Act.

This serves to underscore that, whether or not a problem existed, the 1909 Act contemplated the preservation of common-law copyrights as well as copyrights arising by statute. The interpretation of the 1909 Act adopted by the Court below, thus, is inconsistent with the clear meaning of the Act as recognized by Congress when it drafted the 1976 Act.

IV. The Court Below Incorrectly Relied upon the Approach Taken by the Copyright Office Although That Approach Was Inconsistent with the Correct Interpretation of §7 of the 1909 Copyright Act as Indicated by the Language of the Act and as Recognized by Congress in Drafting the 1976 Act

The Second Circuit relied, in part, upon the "long-standing approach apparently taken by the Copyright Office that the publication of a derivative work constitutes publication of so much as the underlying work as is disclosed in the derivative work". In other words, ignoring the clear language of §7 of the 1909 Act and applicable case law, the Court, relying on the Copyright Office, took the position that a common law copyright covering an underlying work did not survive the incorporation of that underlying work in a derivative work.

Simply stated, the position taken by the Copyright Office was incorrect. While the expertise of the Copyright Office in interpreting and applying the law may be considered by a court, it is not binding. It is for the court itself to correctly interpret and apply the applicable law. See, *Oddzon Products, Inc. v. Oman*, 924 F.2d 346 (D.C. Cir. 1991); *Carol Barnhart, Inc. v. Economy Cover Corp*, 773 F.2d 411

(2nd Cir. 1985). The Copyright Office is required to fashion its practices and procedures to comply with the applicable law. The law is not to be reinterpreted to comply with the practices and procedures of the Copyright Office.

The interpretation of the law and the policy followed by the Copyright Office was incorrect. The Second Circuit, therefore, should not have followed that interpretation and policy in arriving at its decision in this case.

CONCLUSION

This case involves the interpretation of federal statutes and the important rights created thereunder. The correct interpretation of those statutes is of considerable importance to all of those involved in the creation of underlying original works and derivative works. Therefore, and for the reasons stated herein, a writ of certiorari should be granted to review the decision of the Court of Appeals for the Second Circuit.

Respectfully submitted,

MICHAEL H. BERNSTEIN
Counsel of Record
SEDGWICK DETERT MORAN &
ARNOLD

Counsel for Petitioner

Appendix A - Judgment and Order of the United States District Court for the Southern District of New York entered September 15, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____X

SHOPTALK, LTD. and ALAN MENKEN,

Plaintiffs,

- against -

93 Civ. 4984 (DAB)
JUDGMENT AND ORDER

CONCORDE-NEW HORIZON CORP.

Defendant.

_____X

Deborah A. Batts, United States District Judge.

Plaintiffs, Shoptalk, Ltd. and Alan Menken, having duly moved for an order pursuant to Fed. R. Civ. P. 56 declaring (i) that any and all obligations to pay royalties under and pursuant to the 1983 license agreement (the "Agreement") terminated with entry of the licensed motion picture entitled "Little Shop of Horrors" (the "Original Motion Picture") into the public domain in 1988 for failure to renew the copyrights; and (ii) that the underlying screenplay (the "Screenplay") was published simultaneously with the Original Motion Picture in 1960 and is likewise in the public domain for failure to renew the copyright; and

WHEREAS, defendant Concorde-New Horizons Corp. cross-moved for an order pursuant to Fed. R. Civ. P. 56 declaring (i) that the obligation to pay royalties pursuant to the Agreement survives entry of the licensed product into the public domain; and

(ii) that in any case royalty obligations under the Agreement continue premised on copyright protection for the Screenplay which remains unpublished despite publication of the Original Motion Picture; and

The said cross-motions having come before the Honorable Deborah A. Batts, U.S.D.J., and the Court thereafter having rendered its Opinion dated September 8, 1995, declaring that expiration of the Original Motion Picture copyright extinguished any obligations under the Agreement premised on license of the Original Motion Picture; and further holding that the Screenplay was not published as defined under the Copyright Act by publication of the Original Motion Picture and therefore the defendant has been, is, and continues to be entitled to receive royalty payments from plaintiffs premised on license of the Screenplay under the terms of the Agreement, it is hereby

ORDERED AND ADJUDGED that Plaintiffs' motion for summary judgment is granted in part and denied in part for the reasons and to the extent set forth in the Court's Opinion dated September 8, 1995; and it is further,

ORDERED AND ADJUDGED that Defendant's motion for partial summary judgment is granted in part and denied in part for the reasons and to the extent set forth in the Court's Opinion dated September 8, 1995; and it is further,

ORDERED AND ADJUDGED that within thirty (30) days of the date of entry of this Judgment and Order, Plaintiffs pay to the Defendant all domestic and foreign royalties in the amounts specified in and under the terms of the Agreement from this date forward, to continue until expiration of copyright in the Screenplay; and it is further,

ORDERED AND ADJUDGED that Plaintiffs pay within thirty (30) days to the Defendant a sum of money in an amount

equivalent to all withheld domestic royalty payments plus 9% interest from November 1991 to the date of this judgment, and all withheld foreign royalty payments plus 9% interest from July 1993 to the date of this judgment.

Dated: New York, New York
March 5, 1996

Deborah A. Batts
U.S.D.J.

Appendix B - Opinion of the United States District Court for the Southern District Court for the Southern District of New York (Batts, U.S.D.J.), dated September 8, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____X

SHOPTALK, LTD. and ALAN MENKEN,

Plaintiffs,

-v- 93 Civ. 4984 (DAB)
OPINION

CONCORDE-NEW HORIZONS, CORP.,

Defendant.

_____X

DEBORAH A BATTS, U.S.D.J.

This is a contract action based on diversity jurisdiction. The central issue is whether the expiration of Defendant Concorde-New Horizons Corporation's ("Defendant") copyright in the Motion Picture terminates the obligation of Plaintiffs Shoptalk, Ltd. and Alan Menkin (together "Plaintiffs") to pay royalties pursuant to a contract entered into by the parties in 1983 ("the 1983 Agreement"). Plaintiffs seek a declaration that, as a result of the expiration of the Motion Picture copyright, they are no longer bound by the terms of the 1983 Agreement. Defendant seeks a declaration that Plaintiffs are bound by the terms of the 1983 Agreement, despite the expiration of the Motion Picture

copyright. Alleging there are no genuine issues of material fact, both parties have moved for summary judgment.[1]

Facts

In 1959, Charles Byron Griffith ("Griffith") wrote an original screenplay ("the Screenplay") entitled *Little Shop of Horrors.* The Screenplay was produced as an original motion picture ("the Motion Picture") in 1960. In 1983, the owners of the Motion Picture rights ("Millennium"), Griffith, and The Little Shop Company entered into an agreement to license the musical play version ("the Musical") of the Motion Picture.

Under the 1983 Agreement, Alan Menken, the Musical's author, and Howard Ashman, the Musical's composer, agreed to pay royalties for the use of the Motion Picture and Screenplay.[2] Following the 1983 Agreement, Ashman assigned his rights to Plaintiff Shoptalk. In addition, Defendant became the successor-in-interest to Millennium.

Paragraph Ninth of the 1983 Agreement provided that the copyright holders would renew their copyright before the expiration period and that "[i]f the Owner should fail. . . to renew

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[1] The parties have submitted a Joint Rule 3(g) Statement ("3(g) Statement") pursuant to the Local Rules of the Southern District of New York.

[2] Originally, the royalties agreement did not include Griffith. As a result, Griffith brought suit in the Southern District of New York ("the 1982 litigation") to enforce his rights stemming from the Screenplay. Instead of litigating the issue, however, the parties entered into a settlement resulting in the 1983 Agreement. By the 1983 Agreement, Griffith assigned his rights in the Screenplay jointly between Millennium and himself. (3(g) Statement ¶ 21.) As will be explained below, nothing in this opinion disturbs that assignment.

or extend such copyright. . .the Author shall have the right to execute or record such document. . .as Owner's irrevocable attorney-in-fact." Neither party renewed the Motion Picture copyright, pursuant to this provision, and in 1988 the Motion Picture passed into the public domain. (3(g) Statement ¶ 40.) Sometime prior to 1991, Plaintiffs discovered that the Motion Picture copyright had expired and ceased paying royalties to Defendant. (3(g) Statement ¶¶ 50-51.) Plaintiffs, however, continue to pay royalties to Griffith, who is not a party to this action.

In 1992, the Plaintiffs brought a separate action in the Central District of California to enforce certain rights under the 1983 Agreement. That action was settled by the parties on May 27, 1993. (3(g) Statement ¶¶ 56-57.) On July 23, 1993, Plaintiffs brought the present action seeking relief from their obligations to Defendant under the 1983 Agreement.

Plaintiffs allege that their obligations to Defendant under the 1983 Agreement terminated upon expiration of Defendant's copyright in the Motion Picture. Plaintiffs, however, do not dispute their continued obligations to Griffith. On the other hand, Defendant claims that although the Motion Picture copyright expired, the 1983 Agreement was not coterminous with copyright protection. Moreover, it claims that the Screenplay copyright operates to preserve its rights under the Agreement. In response, Plaintiffs dispute the validity of the Screenplay's copyright protection, arguing that both works were simultaneously published and therefore expired simultaneously.

Plaintiffs move for judgment on the pleadings, or, in the alternative, for summary judgment. They seek a declaration that the 1983 Agreement is no longer valid and request the return of royalties paid to Defendant after 1988. Defendant cross-moves for summary judgment on the claim for declaratory relief and

asserts a claim for royalties owing pursuant to the 1983 Agreement. Because the parties rely on affidavits, the motion will be treated as one for summary judgment. See Fed. R. Civ. P. 56(e).

Discussion

Summary judgment is appropriate under Rule 56 where, as here, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); Corselli v. Coughlin, 842 F.2d 23 (2d Cir. 1988).

The central issue is whether expiration of the Motion Picture copyright terminates Defendant's rights under the 1983 Agreement which were based on that Motion Picture copyright. April Productions, Inc. v. G. Schirmer Inc., 308 N.Y. 366 (1955), is dispositive of this issue.

In April Productions, the New York Court of Appeals held that contractual royalty agreements cannot survive the expiration of the underlying copyright. The case involved the English version of a German musical play produced in America by the Shubert Theatrical Company. Shubert acquired the rights to the music in the English version, which had been completely rewritten by certain composers, and contracted with Defendant Schirmer for publication of the music. Schirmer paid royalties to Shubert under the agreement until the end of the first statutory copyright period. At that time, Shubert failed to arrange for the copyright's renewal, and as a result the composers were able to renew it themselves. Schirmer then entered into a new agreement with the composers and discontinued payment to Shubert. Id. at 369-71.

Shubert's assignee brought suit, as in the instant case, asserting a right under the contract, despite the expiration of copyright protection. The New York Court of Appeals rejected this claim, finding that, absent express language to the contrary,[3] such an agreement may not "be construed to require payment of royalties after the expiration of the underlying copyright." Id. at 375 (citation omitted). In so holding, the Court explained the centrality of the copyright to the agreement, stating that "[b]ut for the exclusive rights conferred by the federal statute, Shubert would have had nothing of value to sell or convey." Id. at 374.

This rationale holds true in the instant case. Absent the Motion Picture copyright, Defendant would have had nothing of value to sell or convey to Plaintiffs. Thus, the expiration of the Motion Picture copyright operated to extinguish those of Plaintiffs' obligations under the 1983 Agreement which were dependent on the Motion Picture copyright.

However, Defendant claims that it is entitled to continuing royalties under the 1983 Agreement because the Screenplay copyright, of which the Defendant is co-owner with Griffith, is still valid. Plaintiffs concede that Defendant owns jointly with Griffith any "arguably remaining" rights under the Griffith Screenplay. (Pls. Mem. Supp. at 3.) They argue, however, that the Motion Picture and the Screenplay "entered the public domain" in 1960 when the movie was distributed, thereby extinguishing Defendant's rights. (Id. at 20).

If the publication of the Motion Picture in 1960 did, in fact, also publish the underlying Screenplay, and thus extinguish the common law copyright, then the statutory copyright for the Screenplay (which was obtained in 1982) expired 28 years after

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[3] Defendant has not cited to any explicit contractual language in the 1983 Agreement to bring it within this exception.

that publication, or in 1988, when the Motion Picture copyright expired. If, on the other hand, the Screenplay was not published with the publication of the Motion Picture in 1960, then the statutory copyright obtained in 1982 derived form a common law copyright, which would expire in 2002, at the earliest. Thus, whether there exists today a valid copyright on the Screenplay hinges on whether or not it was published in 1960 by the Motion Picture.

17 U.S.C. ¶ 101 defines a derivative work as

> a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction. . .or any other form in which a work may be recast, transformed, or adapted. (emphasis added)

Thus, the Motion Picture would be a "derivative work" of the Screenplay.

Publication of a derivative work "[does] not vitiate the common law copyrights in the. . .original [work]." Jim Henson Productions, 867 F. Supp. at 186. Accord Stewart v. Abend, 495 U.S. 207, 233, 1105 S. Ct. 1750, 1766 (1990) (applying the rule regardless of whether the underlying work had common law or statutory copyright). By its terms, this rule would apply in the instant case if the Motion Picture is considered to be a "derivative" work.

Here, however, Plaintiffs argue that the relationship between this Screenplay and the Motion Picture is so identical, that the case law on derivative works is inapposite; Plaintiffs assert the Screenplay and the Motion Picture are the same work. They assert that because of the unique nature of the Screenplay, which

includes dialogue, characters, setting, and camera directions, it was wholly incorporated into the Motion Picture. According to Plaintiffs, therefore, the Motion Picture is the same work as the Screenplay, and its publication thus also published the Screenplay.

Although "a screenplay [is] but a roadmap for fixing dialogue on the screen," (Pls. Reply at 3), and Defendant has shown minimal variation in the text of the Motion Picture, no court has gone so far as to hold that two such works are, by definition, one work, or that the publication of the movie, without more, also publishes the underlying screenplay. Such a rule would appear to be inconsistent with the 1976 Act's individual protection of various forms of a work. In addition, a rule stating that works with minimal variation between them are the same work for copyright purposes would require extensive examination of the alleged comparable works by the finder of fact, which would both unnecessarily waste judicial resources as well as introduce substantial uncertainty as to a copyright's validity prior to a Court's adjudication of the issue. For these reasons, this Court declines to find that, as a matter of law, either the Screenplay is the same work as the Motion Picture or that the publication of the Motion Picture published the Screenplay.[4] See O'Neill v.

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[4] Factually, Plaintiffs' assertions that the Motion Picture and the Screenplay are either the same work or that the Motion Picture publication in 1960 also published the Screenplay are severely undermined by its continuing payments to screenwriter Griffith, who shares the Screenplay copyright with the Defendant. No basis for such payments, other than a valid copyright and the 1983 Agreement, has been proffered by the Plaintiffs. The Defendant and Griffith warranted in ¶ I A (c) of the 1983 Agreement that they had not "by reason of any acts of omission or commission, caused the Screenplay to be in the public domain in the U.S. or anywhere else in the world where copyright protection is available for the Screenplay". This warrant was one of the bases on which the Plaintiffs obligated themselves initially in 1983 to make the payments complained of herein. It is also consistent with the Copyright Registration Application for the Screenplay, filed in 1982, which left blank the space for information on

General Film Co., 157 N.Y.S. 1028, 1039-40 (1st Dep't 1916); DeMille v. Casey, 121 Misc. 78, 88 (N.Y. Cty. 1923).

It appears that the better argument is that the Motion Picture is a derivative work of the Screenplay.[5] Therefore, the Screenplay enjoys continued protection, and all rights stemming from the Screenplay, including any rights retained by Defendant as a result of Griffith's assignment, remain in effect.

Conclusion

Plaintiffs' request for declaratory relief is partially granted. Defendant's right, pursuant to the 1983 Agreement, to receive domestic royalties, based on the use of the Motion Picture, expired simultaneously with the expiration of the Motion Picture copyright. See April Productions, 308 N.Y. at 374. Defendant's request for damages for unpaid royalties relating to the Motion Picture are, therefore, denied.

This relief, however, has no effect on the validity of Defendant's rights as they relate to its joint interest in the Screenplay. Indeed, Defendant retains the right to receive royalties for use of the Screenplay under the 1983 Agreement.[6]

"published" works, as instructed to do if the work was not published. This constellation of facts most strongly suggests that none of the parties herein, nor their predecessors in interest, as of 1982, 1983, or 1985, considered that the Motion Picture published the Screenplay in 1960.

[5] Even though, concededly, the Copyright Registration Application for the Motion Picture, filed in 1985, did not list the prior registration in 1982 of the Screenplay as an earlier version of the Motion Picture, or classify the Screenplay as either a "preexisting work" for the movie, or classify the Motion Picture as a "derivative work" of the Screenplay.

[6] Under New York law, this Court has the power to rescind that portion of the 1983 Agreement that relates to the royalties for the Motion Picture while at the same time holding that the portion of the contract covering the

Plaintiffs' request for restitution of royalties paid to Defendant after the expiration of the Motion Picture copyright is therefore denied as well.

To the extent that foreign Motion Picture rights are based on the expired domestic Motion Picture copyright, they are no longer valid; however, foreign Motion Picture rights which arise from currently valid copyrights continue in full force and effect.

SO ORDERED

DEBORAH A. BATTS, U.S.D.J.

Dated: New York, New York
September 8, 1995

Screenplay royalties is still valid. See Ripley v. International Railways, 8 N.Y.2d 430, 437 (1960), reh'g denied, 9 N.Y.2d 758 (1961) ("'When a contract is separable or divisible into a number of elements or transactions, each of which is so far independent of the others that it might stand or fall by itself, and good cause for rescission exists as to one such portions, it may be rescinded and the remainder of the contract affirmed.'").

Appendix C - Opinion of the United States Court of Appeals for the Second Circuit, filed February 3, 1999

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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August Term, 1997

(Argued: May 22, 1998 Decided: Feb. 3, 1999)

Docket Nos. 97-9209 (L), 97-9251

SHOPTALK, LTD., ALAN MENKEN,

Plaintiffs-Counterclaim-Defendants-Appellants-Cross-Appellees,

-v-

CONCORDE-NEW HORIZONS CORP.,

Defendant-Counterclaimant-Appellee-Cross-Appellant

Before: MESKILL and KEARSE, Circuit Judges, and TELESCA, District Judge*.

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* Honorable Michael A. Telesca, of the United States District Court for the Western District of New York, sitting by designation.

Appeal and cross-appeal from a judgment of the United States District Court for the Southern District of New York, Deborah A. Batts, Judge, ordering plaintiffs to pay defendant a total of $132,436.49 as unpaid copyright royalties plus interest for use of material in a motion picture screenplay, and ordering plaintiffs to pay future royalties until expiration of copyright in screenplay, See 897 F. Supp. 144 (1995).

Affirmed in part, vacated and remanded in part.

DOROTHY M . WEBER, New York, New York (Lisa Martinez, Shukat Arrow Hafer & Weber, New York, New York, on the brief), Plaintiffs-Counterclaim-Defendants-Appellants-Cross-Appellees.

HOWARD R. COHEN, New York, New York, (Eric M. Kraus, Natalie A Napierala, Sedgwick, Detert, Moran & Arnold, New York, New York, on the brief), Defendant-Counterclaimant-Appellee-Cross-Appellant.

DANIEL S. ALTER, Assistant United States Attorney, New York, New York (Mary Jo White, United States Attorney for the Southern District of New York, Steven M. Haber, Assistant United States Attorney, New York, New York, on the brief), for United States Copyright Office as amicus curiae.

JAMES NISS, New York, New York, filed a brief as Amicus Curiae pro se.

KEARSE, Circuit Judge:

Plaintiffs Shoptalk, Ltd. ("Shoptalk"), and Alan Menken appeal from so much of a final judgment of the United States District Court for the Southern District of New York, Deborah A. Batts, Judge, as (a) ordered Shoptalk to pay defendant

Concorde-New Horizons Corp. ("Concorde") $75,592.65 and ordered Menken to pay Concorde $56,843.84, both sums representing unpaid royalties and prejudgment interest, for use of material in a 1959 screenplay co-owned by Concorde and registered for copyright protection in 1982 as an unpublished work, and (b) ordered plaintiffs to make future royalty payments until the expiration of the copyright in the screenplay. The district court ruled that Concorde's copyright in the screenplay has not expired because the screenplay was neither published nor registered prior to 1982, notwithstanding the 1960 publication of a motion picture (whose copyright has now expired) based on the screenplay. On appeal, Shoptalk and Menken, supported by the United States Copyright Office ("Copyright Office") as amicus curiae, argue that the district court erred in ruling that publication of the motion picture did not constitute publication of its underlying screenplay. Concorde has cross-appealed from so much of the judgment as limits its recovery of royalties to the lives of the copyrights in the screenplay and the motion picture, contending that an agreement among the parties obligates plaintiffs to pay royalties independently of the existence of the copyrights. For the reasons that follow, we reject Concorde's arguments in support of its cross-appeal, and we agree with plaintiffs and the Copyright Office that, under the Copyright Act of 1909, which governs works published before 1978, see 17 U.S.C. § 1 et seq., ("1909 Act"), repealed effective 1978 by Copyright Act of 1976, 17 U.S.C. § 101 et seq. ("1976 Act"), the publication of the Motion Picture in 1960 published so much of the Screenplay as was disclosed in the Film. We therefore affirm in part, vacate in part, and remand for further proceedings.

I. BACKGROUND

At the core of the present dispute is an original screenplay ("Screenplay") entitled "The Little Shop of Horrors," authored by Charles Byron Griffith in 1959, which is the subject of an

agreement dated May 27, 1983 ("1983 Agreement" or "Agreement") settling a prior dispute. The facts have largely been stipulated here.

A. The Film, the Musical Stage Play, and the 1983 Agreement

In 1960, a motion picture entitled "The Little Shop of Horrors" ("Motion Picture" or "Film") was produced, based on the Screenplay. The Screenplay was registered for copyright protection in 1982, pursuant to an application indicating that it was an unpublished work. The copyright in the Screenplay was assigned jointly to Griffith and Millennium Films, Inc. ("Millennium"), which was successor-in-interest to New World Pictures, Inc. ("New World"), the original owner of the Motion Picture. The Motion Picture itself was registered for copyright protection in 1985, and its registration stated the Film's date of first publication as January 5, 1960. The copyright in the Motion Picture was assigned to Millennium. Concorde is a successor-in-interest to Millennium and has "all of Millennium's rights, if any," in the Film "and Millennium's rights, if any, in and to the underlying screenplay." (Joint Statement pursuant to Rule 3(g) of the Local Rules for the Southern District of New York (1994) ¶ 10.)

In 1981, New World authorized the production of a musical stage play ("Musical") based on the Film. The Musical's score was composed by Menken; its book and lyrics were written by Howard Ashman, who eventually assigned his rights and obligations in the book and lyrics to Shoptalk. A controversy arose in 1982 when Griffith contended that the Musical infringed his rights in the Screenplay; the dispute was settled by the 1983 Agreement.

In the 1983 Agreement, the Musical's producers were given the rights, inter alia, to "make, write[,] compose," and produce a "dramatico-musical stage play" based on the Motion Picture and the Screenplay (1983 Agreement ¶ SECOND); in return,

Menken, Ashman, and the producers agreed to pay royalties (id. ¶ THIRD). The 1983 Agreement provided that the copyright "Owner" (defined as Millennium and Griffith) would "renew or extend" the copyright in "the Work" (defined as the Motion Picture) prior to its expiration, and that if they

> should fail or neglect to execute or record any document required to renew or extend such copyright, and/or to confirm or effectuate the rights granted hereunder, . . . [Menken and Ashman] shall have the right to execute or record such document, in Owner's name as Owner's irrevocable attorney-in-fact.

(Id. ¶ NINTH.)

The copyright in the Film was not renewed; it expired in 1988, and the Film entered the public domain. Sometime prior to 1991, Shoptalk and Menken learned of the failure to renew, and they thereafter ceased making royalty payments to Concorde. (They continued, however, to pay royalties to Griffith.)

B. The Present Action

Plaintiffs commenced the present diversity action in 1993, asserting principally that their obligations to make royalty payments under the 1983 Agreement ended upon the expiration of Concorde's copyright in the Motion Picture. Plaintiffs contended that, in the Agreement, Concorde agreed to renew the copyright in the Motion Picture and that the failure to do so constituted a material breach, relieving them of any further royalty obligations. The amended complaint requested a judgment declaring, inter alia, that, pursuant to the Agreement and United States copyright law, Concorde had no right to collect further domestic royalties; that plaintiffs were entitled to reimbursement for royalty payments made to Concorde after the copyright's expiration; and that their continuing production of

the Musical would not constitute copyright infringement of the Motion Picture.

Concorde took the position that plaintiffs' rights and obligations under the 1983 Agreement were not conditioned on the renewal of the Motion Picture copyright and that it was plaintiffs who had breached. Concorde alleged that plaintiffs had agreed to pay royalties based on "the right to prepare, produce, and publicly perform and/or display a musical play based upon and derived from the screenplay and the original motion picture" (Answer ¶ 46), and that by failing to pay royalties on the performance or display of "derivative works based upon the screenplay and motion picture," plaintiffs had breached and were continuing to breach the 1983 Agreement (id. ¶ 49). Concorde contended that its nonrenewal of the Motion Picture copyright gave plaintiffs the right to renew the copyright but gave them no other rights.

Concorde also contended, inter alia, that a valid copyright subsisted in the underlying Screenplay, which preserved Concorde's right to receive royalty payments under the Agreement, and that plaintiffs' claims were barred by estoppel, ratification, laches, and waiver. In a counterclaim, Concorde requested, inter alia, a judgment declaring that plaintiffs remained bound by the terms of the 1983 Agreement, an injunction prohibiting plaintiffs from exercising rights granted by the Agreement, and compensatory damages for unpaid royalties due under the 1983 Agreement.

Plaintiffs disputed Concorde's contention that the copyright in the Screenplay could survive expiration of the copyright in the Motion Picture, arguing that the publication of the Motion Picture also published the underlying Screenplay. Accordingly, plaintiffs argued that the Screenplay was published when the Film was produced in 1960, and that when the copyright in the

Film was not renewed in 1988, both the Motion Picture and the Screenplay entered the public domain.

The parties submitted to the court a joint statement of the material facts as to which they agreed there was no genuine dispute, and both sides moved for summary judgment. In an opinion reported at 897 F. Supp. 144 (1997), the district court granted in part and denied in part both motions. Citing New York State law, it agreed with plaintiffs that, because "[a]bsent the Motion Picture copyright, [Concorde] would have had nothing of value to sell or convey to Plaintiffs,"

> the expiration of the Motion Picture copyright operated to extinguish those of Plaintiff's obligations under the 1983 Agreement which were dependent on the Motion Picture copyright.

Id. at 146 (citing April Productions, Inc. v. G. Schirmer Inc., 308 N.Y. 366, 374, 126 N.E.2d 283, 288 (1955)). Thus the court concluded that plaintiffs were entitled to a declaration that Concorde's "right, pursuant to the 1983 Agreement, to receive domestic royalties, based on the use of the Motion Picture, expired simultaneously with the expiration of the Motion Picture copyright," and it denied Concorde's request for "damages for unpaid royalties relating to the Motion Picture." 897 F. Supp. at 147.

However, the district court agreed with Concorde that a valid copyright in the Screenplay survived the expiration of the statutory copyright in the Film. It rejected plaintiffs' contention that publication of the Motion Picture also published the underlying Screenplay, stating that a motion picture is a distinct "derivative work" of the underlying screenplay that "[does] not vitiate common law copyrights in the . . . original work." Id. at 146 internal quotation marks omitted). The court also rejected

plaintiffs' contention that the Motion Picture and Screenplay were so nearly identical as to constitute a single work for copyright purposes, stating that

> a rule stating that works with minimal variation between them are the same work for copyright purposes would require extensive examination of the alleged comparable works by the finder of fact, which would both unnecessarily waste judicial resources as well as introduce substantial uncertainty as to a copyright's validity prior to a Court's adjudication of the issue.

Id. at 147. The court concluded that "the Screenplay enjoys continued protection, and all right stemming from the Screenplay, including any rights retained by [Concorde] . . . remain in effect," and that Concorde "retains the right to receive royalties for use of the Screenplay under the 1983 Agreement." Id.

Judgment was entered ordering plaintiffs to pay past-due royalties as indicated above and to continue paying royalties until the expiration of the copyright in the Screenplay, but not longer.

C. The Present Appeals

In this Court, plaintiffs and Concorde principally pursue the positions they advocated in the district court. On its cross-appeal, Concorde contends chiefly that the 1983 Agreement is enforceable independently of the validity its copyright in the Motion Picture or the Screenplay, and that plaintiffs waived their rights to seek relief from their contractual obligations. We reject these contentions substantially for the reasons stated by the district court. See April Productions Inc. v. G. Schirmer, Inc., 308 N.Y. at 375, 126 N.E.2d at 289 (under rules of construction applicable to copyright licenses, an "agreement may not . . . in the absence of express language . . . be construed to require

payment of royalties after the expiration of the underlying copyrights."). We see no such express contractual language in this case, nor any waiver. Accordingly, we affirm so much of the district court's judgment as is challenged in the cross-appeal.

On plaintiffs' appeal, the Copyright Office--which did not appear in the district court--has submitted a brief as amicus curiae, arguing that, under the 1909 Act, "portions of screenplays embodied in the motion picture are published upon publication of the motion picture." (Brief of Copyright Office at 16 (internal quotation marks omitted).) Concorde urges that we reject this view on the basis that Griffith had a common-law copyright in the Screenplay and that that constituted a "subsisting copyright" within the meaning of § 7 of the 1909 Act and hence, by the terms of that section, was not affected by the publication of the Film as a derivative work. For the reasons that follow, we reject Concorde's reading of the 1909 Act and agree with plaintiffs and the Copyright Office that the publication of the Motion Picture in 1960 published so much of the Screenplay as was disclosed in the Film.

II. DISCUSSION

The Constitution gives Congress the power "[t]o promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ." U.S. Const. Art. I., § 8, cl. 8. The copyright statutes enacted by Congress have thus had as their purpose protecting the "benefit of [such] property for a limited term of years," and those "statutes should be given a fair and reasonable construction with a view to effecting such purpose." American Tobacco Co. v. Werckmeister, 207 U.S. 284, 291 (1907).

The 1909 Act, which was repealed by the 1976 Act, governs works published before 1978. See, e.g., 1976 Act, 17 U.S.C. § 301 (b) (2); Sanga Music, Inc. v. EMI Blackwood Music, Inc., 55 F.3d 756, 758 (2d Cir. 1995). The 1909 Act established a regime in which published works could receive statutory protection under federal law, while unpublished works retained such protection as they were given by state common law.

Under the 1909 Act, the publication of a work, with a proper notice, secured statutory copyright protection. See 17 U.S.C. § 10 (repealed effective 1978). "'[P]ublication occurs when by consent of the copyright owner, the original or tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public . . . .'" Bartok v. Boosey & Hawkes, Inc., 523 F.2d 941, 945 (2d Cir. 1975) (quoting 1 M. Nimmer, The Law of Copyright § 49, at 194-95 (1974)). The 1909 Act provided authors an initial 28-year term of protection, calculated from the date of publication, which could be renewed for an additional 28 years. See 17 U.S.C. § 24 (repealed effective 1978). If the initial copyright term expired without renewal, the work entered the public domain; if the copyright was renewed, the work entered the public domain at the conclusion of the renewal term.

Under the 1909 Act, unpublished works retained common-law protection. Section 2 of that Act provided as follows:

> Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, or to obtain damages therefor.

17 U.S.C. § 2 (repealed effective 1978). Thus, the 1909 Act "specifically exempt[ed] from coverage (and from preemption)

the common-law right of an author of an 'unpublished' work." Roy Export Company Establishment of Valduz, Liechtenstein v. Columbia Broadcasting System, Inc., 672 F.2d 1095, 1101 (2d Cir.) ("Roy Export"), cert. denied, 459 U.S. 826 (1982).

The common law "protects the author's interest prior to publication." Sanga Music, Inc. v. EMI Blackwood Music, Inc., 55 F.3d at 758. It thus "allows the author to control the first publication of the work." Id. Once the author publishes the work, or a third party publishes the work with the consent of the author, the author's common-law right of first publication ends. See, e.g., Caliga v. Inter Ocean Newspaper Co., 215 U.S. 182, 188 (1909) ("At common law, the exclusive right to copy existed in the author until he permitted a general publication. Thus, when a book was published in print, the owner's common-law right was lost."); Batjac Productions, Inc. v. Goodtimes Home Video Corp., 160 F.3d 1223, 1226, 1235 (9th Cir. 1998); Sanga Music, Inc. v. EMI Blackwood Music, Inc., 55 F.3d at 758. Further, the securing of a statutory copyright, either by general publication with a proper notice or by registration of the work, ended the common-law protection. See, e.g., Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 347 (1908) (common-law and statutory "rights do not co-exist in the same composition; when the statutory right begins the common-law right ends"); Roy Export, 672 F.2d at 1101 n.13 ("a single work cannot be protected from copying under both federal and state law at the same time"); Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co., 155 N.Y. 241 (1898) ("no proposition is better settled than that a statutory copyright operates to divest a party of the common law right"). So long as the original work remained unregistered and unpublished, however, the common law protected the author's rights in the work in perpetuity. See, e.g., Ferris v. Frohman, 223 U.S. 424, 434 (1912).

"The right of first publication encompasses not only the choice whether to publish at all, but also the choices when, where, and in what form first to publish a work." Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 564 (1985). This does not, however, allow the author to treat each publication in a new medium as a "first" publication. See, e.g., Batjac Productions, Inc. v. Goodtimes Home Video Corp., 160 F.3d at 1235 (right to control first publication "does not entail multiple first publication rights in every available medium"); cf. RCA Manufacturing Co. v. Whiteman, 114 F.2d 86, 88 (2d Cir.) (Music conductor's "common-law property in [musical] performances ended with the sale of records" because those records "embodied [his] 'common-law property', his contribution as a conductor–in precisely the same way that the record of such a score would embody his composition"), cert. denied, 311 U.S. 712 (1940). Thus, once a work is published with the author's consent in any medium, it loses its common-law protection. In sum, under the 1909 Act, "[s]tate law protection begins with a work's creation and continues until the work is 'published' " or registered, "at which point state protection is lost." Roy Export, 672 F.2d at 1101.

The 1909 Act also provides protection for copyrighted works that are incorporated in later works. Section 7 of the 1909 Act provided that

> [c]ompilations or abridgments, adaptations, arrangements dramatizations, translations, or other versions of works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this title; but the publication of any such new work shall not affect the force or validity of any

> subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works.

17 U.S.C. § 7 (repealed effective 1978) (emphasis added). Such collective works are referred to as "derivative works" in the treatises and caselaw. See, e.g., Roy Export, 672 F.2d at 1103, n.17; Rohauer v. Killiam Shows, Inc., 551 F.2d 484, 488 n.3 (2d Cir.) (tracing the history of statutory and caselaw protection for "derivative works"), cert. denied, 431 U.S. 949 (1977), called into doubt on other grounds by Stuart v. Abend, 495 U.S. 207 (1990); M. Nimmer & D. Nimmer, Nimmer on Copyright § 4.12 [A], at 4-60 to 4-61 (1997) ("Nimmer") (citing cases); see also 1976 Act, 17 U.S.C. § 101 (defining "derivative works" consistently with that term as used in the cases). We have noted that when the author consents to the inclusion of his work in a derivative work, the publication of the derivative work, to the extent that it discloses the original work, also constitutes publication of that underlying work. See, e.g., Roy Export, 672 F.2d at 1102 ("Normally, publication of a collective work is also publication of its preexisting component works."); Nimmer § 4.12 [A] at 4-60 ("any authorized publication of a derivative work must necessarily also constitute a publication of the preexisting work upon which it is based"). Thus, because "a single work cannot be protected from copying under both federal and state law at the same time," Roy Export, 672 F.2d at 1101 n.13, where the author of a previously unpublished work consented to its inclusion in a published collection, that publication extinguished the common-law copyright in the underlying work, see, e.g., Sanga Music, Inc. v. EMI Blackwood Music, Inc., 55 F.3d at 758.

Concorde argues, however, that § 7 of the 1909 Act, in stating that the publication of a new derivative work "shall not affect

the force of validity of any subsisting copyright upon the matter employed," 17 U.S.C. § 7 (repealed effective 1978), was meant to preserve the protection afforded an author under the common law. We disagree. Reading the term "subsisting copyright" in the context of the statute as a whole, we cannot include that that term refers to common-law rights. Although some of the cases decided around the time the 1909 Act was passed used the term "copyright" to refer not only to statutory copyright but also to common-law protection, the 1909 Act itself appeared clearly to use the term "copyright" only when it was referring to the statutory copyright. Thus, § 2, which is the only section of the 1909 Act to refer expressly to the common-law protection for unpublished works, see 17 U.S.C. § 2 ("Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity to prevent the copying, publication, or use of such unpublished work without his consent, or to obtain damages therfor.") (repealed effective 1978), nowhere uses the word "copyright."

In contrast, other sections of the 1909 Act used the words "copyright" and "subsisting . . . copyright" in ways that exclude the common-law right. For example, § 10 of the 1909 Act provided, in pertinent part, that "[a]ny person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title," 17 U.S.C. § 10 (repealed effective 1978) (emphasis added); and § 13 provided for certain procedures after "[c]opyright has been secured by publication of the work with the notice of copyright," id. § 13 (repealed effective 1978) (emphasis added). Since the common-law right protected only unpublished works, the "copyright" that those sections referred to as being "secured" by publication could not refer to the common-law right. Further, if "copyright" referred to common-law rights, these provisions would, nonsensically, have provided for the "secur[ing]" (for a

limited time) of a right that the owner already possessed (in perpetuity). Similarly, § 3 of the 1909 Act provided that "[t]he copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright." 17 U.S.C. § 3 (repealed effective 1978) (emphasis added). Since the common-law right in a work that remained unpublished existed in perpetuity, however, if "subsisting . . . copyright" meant thecommon-law right, the reference to "extending [its] duration" would likewise make no sense. We conclude that the "subsisting copyright" language in § 7 of the 1909 Act refers only to statutory copyright, and not to common-law protection. Accord Batjac Productions, Inc. v. Goodtimes Home Video Corp., 160 F.3d at 1228-29.

In Batjac, the Ninth Circuit ruled that the publication of a motion picture publishes so much of the underlying screenplay as was disclosed in the motion picture. See, id. at 1225, 1236. The court reasoned that a contrary rule would turn on its head the copyright principle of limited monopoly, in that "the copyright in any film that has entered the public domain under the 1909 Act could be resurrected by an unpublished screenplay." Id. at 1233. We find this reasoning persuasive and consonant with the principles approved in our prior cases, to wit, that when the author consents to the inclusion of his work in a derivative work, the publication of the derivative work, to the extent that it discloses the original work, also constitutes publication of that underlying work. See, e.g., Roy Export, 672 F.2d at 1102. We conclude in the present case, based on the statute and the principles underlying the scope of copyright protection, that if a previously unpublished screenplay is embodied in a motion picture, so much of the screenplay as is disclosed in the motion picture is published when the motion picture is published.

This interpretation is also consistent with the longstanding approach apparently taken by the Copyright Office, that the publication of a derivative work constitutes publication of so much of the underlying work as is disclosed in the derivative work. See, e.g., Compendium of Copyright Office Practices under the 1976 Act, at § 910.04 (1984) ("The inclusion of an unpublished work in another work that is later published results in the publication of the first work to the extent that it is disclosed in the published work."); id. (Example 1) ("Where a preexisting unpublished screenplay is embodied in a motion picture, those elements of the screenplay disclosed in the motion picture are considered to be published at the same time as the motion picture is published."); 1977 Compendium of Copyright Office Practices under the 1909 Act, at § 3.1.1 IV.a. ("[p]ublication of a portion of a work does not necessarily mean that the work as a whole has been published" (emphasis added))

Although Concorde contends that the Supreme Court's decision in Stewart v. Abend, 495 U.S. 207, constitutes "authoritative precedent" for the contrary proposition (Concorde brief on appeal at 32), Stewart is inapposite since it involved an underlying story protected by statutory copyright, not by common law. Nor are we persuaded that acceptance of Concorde's view is required by a statement in our opinion in Gilliam v. American Broadcasting Companies, 538 F.2d 14 (1976). Although a footnote in Gilliam stated that "the same principles [of §7] with respect to derivative works adapted from material in which there is a statutory copyright also apply to material in which there is a common law copyright," 538 F.2d at 20 n.3, that statement was, as we have previously noted, dictum, see, e.g., Roy Export, 672 F.2d at 1103, and indeed, was apparently not meant to adopt a position for we went on to note that

> [t]he law is apparently unsettled with respect to whether a broadcast of a recorded program constitutes

> publication of that program and the underlying script so as to divest the proprietor of the script of his common law copyright. Arguably, once the scriptwriter obtains the economic benefit of the recording and the broadcast, he has obtained all that his common law copyright was intended to secure for him; thus it would not be unfair to find that publication of the derivative work divested the script of its common law protection. On the other hand, several types of performances from scripts have been held not to constitute divestive publication, and it is unclear whether a broadcast of the recording in itself constitutes publication.

Gilliam, 538 F.2d at 20 n.3 (internal citations omitted). And far from purporting to decide this "unsettled" issue, we expressly noted that this was a question whose resolution was neither necessary nor undertaken:

> Since ABC has not objected to [the author's] assertion of common law copyright in an unpublished script, we need not entertain the question on this appeal for a preliminary injunction. We leave initial determination of this perplexing question to district court in its determination of all the issues on the merits.

Id. (emphasis added).

The issue is squarely presented for the first time in the instant case, and we conclude, for the reasons discussed above, that the Motion Picture at issue here, which was published in 1960 and was based on the Screenplay, published the Screenplay to the extent that the Screenplay was thereby disclosed.

CONCLUSION

We have considered all of Concorde's arguments on these appeals and have found them to be without merit. For the reasons stated above, the judgment of the district court is affirmed insofar as it denied Concorde's contract claims, and is vacated insofar as it upheld Concorde's copyright claims. The matter is remanded for further proceedings to permit the district court to inter alia, make a comparison of the two works in order to determine the extent to which the Screenplay was disclosed in the Motion Picture and hence was unprotected after Concorde failed to renew the copyright in the Motion Picture. We express no view as to the merits of the Copyright Office's suggestion that Griffith's failure to disclose the 1960 publication of the Motion Picture on his 1982 registration application may invalidate his 1982 registration in toto.

Costs to plaintiffs.

Appendix D - Copyright Act of 1909, 17 U.S.C. §1, et. seg.

The Copyright Act of 1909 (as amended and codified)

Title 17—Copyrights[1]

CHAPTER Sec.

1. REGISTRATION OF COPYRIGHT 1

[1] Act of July 30, 1947, ch, 391, 61 Stat, 652, codifying the Act of March 4,1909, ch. 320, 35 Stat, 1075, whose effective date was July 1,1909. The enacting clause provides that Title 17 of the United States Code entitled "Copyrights" is codified and enacted into positive law and may be cited as "Title 17, U.S.C., Sec. —". The Act of April 27, 1948, 62 Stat. 202, amended sections 211 and 215. The Act of June 25, 1948, 62 Stat. 869, repealed sections 101 (f), 102, 103, 110 and 111; however, see sections 1338, 1440 and 2072 (Title 28, United States Code) appearing *infra* and the federal Rules of Civil Procedure. The Act of June 3, 1949, 63 Stat. 153, amended sections 16, 22, 23 and 215. The Act of October 31, 1951, 65 Stat. 710, amended sections 3, 8, 112 and 114, and struck out the items of the analysis of chapter 2 relating to the repealed sections. The Act of July 17, 1952, 66 Stat. 752 amended section 1 (c). The Act of April 13,1954, 68 Stat. 52 added section 216. The Act of August 31, 1954, 68 Stat. 1030, amended sections 9, 16 and 19. The Act of March 29, 1956, 70 Stat. 63, amended section 13. The Act of September 7, 1957, 71 Stat. 633, amended section 115. The Act of September 7, 1962, 79 Stat, 606, amended section 21. The Act of October 15, 1971 (85 Stat. 391) amended sections 1, 5, 19, 20, 26 and 101. The Act of December 3, 1974, 88 Stat. 1873, amended section 104. The text was effective until January 1, 1978. Section and subsection headings were first added in 1947.

(Amended July 30, 1947, ch. 391, 61 Stat. 652; July 17, 1952 ch. 923, § 1, 66 Stat. 752; October 15, 1971, Pub. L. 92-140, § 1(a), 85 Stat. 391.)

§2. Rights of author or proprietor of unpublished work

Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.

(Amended July 30, 1947, ch. 391, 61 Stat. 654.)

§3. Protection of component parts of work copyrighted; composite works or periodicals

The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title.

(Amended July 30, 1947, ch. 391, 61 Stat. 654; October 31, 1951, ch. 655, § 16(a), 65 Stat. 716.)

§4. All writings of author included

The works for which copyright may be secured under this title shall include all the writings of an author.

(Amended July 30, 1947, ch. 391, 61 Stat. 654.)

§ 5. Classification of works for registration

The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

(a) Books, including composite and cyclopedic works, directories, gazetteers, and other compilations.

(b) Periodicals, including newspapers.

(c) Lectures, sermons, addresses (prepared for oral delivery).

§ 6. Registration of prints and labels[13]

Commencing July 1, 1940, the Register of Copyrights is charged with the registration of claims to copyright properly presented, in all prints and labels published in connection with the sale or advertisement of articles of merchandise, including all claims to copyright in prints and labels pending in the Patent Office and uncleared at the close of business June 30, 1940.[14] There shall be paid for registering a claim of copyright in any such print or label not a trademark $6, which sum shall cover the expense of

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[13] This section was added to the 1909 Act on July 31, 1939, ch. 396, §3,53 Stat. 1142.

[14] The 1939 Amendment contained the following temporary provision prior to the final sentence: All such pending applications and all fees which have been submitted or paid to or into the Patent Office for such pending applications, and all funds deposited and at the close of business June 30, 1940, held in the Patent Office to be applied to copyright business in that Office, shall be returned by the Commissioner of Patents to the applicants. This sentence was omitted in the 1947 codification.

furnishing a certificate of such registration, under the seal of the Copyright Office, to the claimant of copyright.

(Amended July 31, 1939, ch. 396, § 3, 53 Stat. 1142; July 30, 1947, ch. 391, 61 Stat. 654.)

§ 7. Copyright on compilations of works in public domain or of copyrighted works; subsisting copyrights not affected[15]

Compilations or abridgements, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this title; but the publication of any such new works shall not effect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works.

(Amended July 30, 1947, ch. 391, 61 Stat. 655.)

20: *Provided, however,* That such exemptions shall apply only if from the time of first publication all the copies of the work published with the authority of the author or other copyright proprietor shall bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright.

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[15] This was § 6 of the 1909 Act.

Upon the coming into force of the Universal Copyright Convention[20] in a foreign state or nation as hereinbefore provided, every book or periodical of a citizen or subject thereof in which ad interim copyright was subsisting on the effective date of said coming into force shall have copyright for twenty-eight years from the date of first publication abroad without the necessity of complying with the further formalities specified in section 23 of this title.

The provisions of this subsection shall not be extended to works of an author who is a citizen of, or domiciled in the United States of America regardless of place of first publication, or to works first published in the United States.

(Amended December 18, 1919, ch. 11, 41 Stat. 369; September 25, 1941, ch. 421, 55 Stat. 732; July 30, 1947, ch. 391, 61 Stat. 655; August 31, 1954, ch. 1161, § 1, 68 Stat. 1030.)

§ 10. Publication of work with notice[21]

Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 22 of this title.

(Amended July 30, 1947, ch. 391, 61 Stat. 656.)

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[20] See N. 19 *supra*.

[21] This was § 9 of the 1909 Act.

§ 11. Registration of claim and issuance of certificate[22]

Such person may obtain registration of his claim to copyright by complying with the provisions of this title, including the deposit of copies, and upon such compliance the Register of Copyrights shall issue to him the certificates provided for in section 209 of this title.

12 of this title, such copies or copy, print, photograph, or other reproduction to be accompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with.

(Amended March 28, 1914, ch. 47, § 1, 38 Stat. 311; July 30, 1947, ch. 391, 61 Stat. 656; March 29, 1956, ch. 109, 70 Stat. 63.)

§ 14. Same; failure to deposit; demand; penalty[26]

Should the copies called for by section 13 of this title not be promptly deposited as provided in this title, the Register of Copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from any part of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to

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[22] This was § 10 of the 1909 Act.

[26] This was § 13 of the 1909 Act.

a fine of $100 and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void.

§ 15. Same; postmaster's receipt; transmission by mail without cost[27]

The postmaster to whom are delivered the articles deposited as provided in sections 12 and 13 of this title shall, if requested, give a receipt therefor and shall mail them to their destination without cost to the copyright claimant.

(Amended July 30, 1947, ch. 391, 61 Stat. 657.)

§ 16. Mechanical work to be done in United States[28]

Of the printed book[29] or periodical specified in section 5,

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[27] This was § 14 of the 1909 Act.

[28] This was §15 of the 1909 Act.

[29] The 1909 Act read as follows:

That the printed book or periodical specified in section five, subsections (a) and (b) of this Act, except the original text of a book of foreign origin in a language or languages other than English, the text of all copies accorded protection under this Act, except as below provided, shall be printed from type set within the limits of the United States, either by hand or by the aid of any kind of typesetting machine, or from plates made within the limits of the United States from type set therein, or, if the text be produced by lithographic process, or photo-engraving process, then by a process wholly performed within the limits of the United States, and the printing of the text and binding of the said book shall be performed within the limits of the United States; which requirements shall extend also to the illustrations within a book consisting of printed text and illustrations produced by lithographic process, or photoengraving process, and also to separate lithographs or photo-engravings, except where in either case the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art: but they shall not apply to works in raised

characters for the use of the blind, or to books of foreign origin in a language or languages other than English, or to books published abroad in the English language seeking ad interim protection under this Act.

In 1926 the act was amended by adding the following clause to the final sentence: "or to works printed or produced in the United States by any other process than those above specified in this section." The 1947 codification did not amend the prior text.

The 1949 amendment read as follows:

Of the printed book or periodical specified in section five, subsections (a) and (b), of this title, except the original text of a book or periodical of foreign origin in language or languages other than English, the text of all copies accorded protection under this title, except as below provided, shall be printed from type set within the limits of the United States, either by hand or by the aid of any kind of typesetting machine, or from plates made within the limits of the United States from type set therein, or, if the text be produced by lithographic process, or photoengraving process, then by a process wholly performed within the limits of the United States, and the printing of the text and binding of the said book shall be performed within the limits of the United States; which requirements shall extend also to the illustrations within a book consisting of printed text and illustrations produced by lithographic process, or photoengraving process, and also to separate lithographs or photoengravings, except where in either case the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art: *Provided, however,* that said requirements shall not apply to works in raised characters for the use of the blind, or to books or periodicals of foreign origin in a language or languages other than English, or to works printed or produced in the United States by any other process than those above specified in this section, or to copies of books or periodicals, of foreign origin, in the English language, imported into the United States within five years after first publication in a foreign state or nation up to the number of fifteen hundred copies of each such book or periodical if said copies shall contain notice of copyright in accordance with sections 10, 19, and 20 of this title and if ad interim copyright in said work shall have been obtained pursuant to section 22 of this title prior to the importation into the United States of any copy except those permitted by the provisions of section 107 of this title: *Provided further,* That the provisions of this section shall not affect the right of importation under the provisions of section 107 of this title, nor the extension of time within which to comply with conditions and formalities granted by Presidential proclamation, No. 2608, of March 14, 1944.

The current version reflects the amendments of Act August 31, 1954 and was effective September 16, 1955.

subsections (a) and (b), of this title, except the original text of a book or periodical[30] of foreign origin in a language or languages other than English, the text of all copies accorded protection under this title, except as below provided, shall be printed from type set within the limits of the United States, either by hand or by the aid of any kind of typesetting machine, or from plates made within the limits of the United States from type set therein, or, if the text be produced by lithographic process, or photoengraving process, then by a process wholly performed within the limits of the United States, and the printing of the text and binding of the said book shall be performed within the limits of the United States; which requirements shall extend also to the illustrations within a book consisting of printed text and illustrations produced by lithographic process, or photoengraving process, and also to separate lithographs or photoengravings, except where in either case the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art:

Provided, however, That said requirements shall not apply to works in raised characters for the use of the blind, or to books or periodicals of foreign origin in a language or languages other than English, or to works printed or produced in the United States by any other process than those above specified in this section, or to copies of books or periodicals, first published abroad in the English language, imported into the United States within five years after first publication in a foreign state or nation up to the number of fifteen hundred copies of each such book or periodical if said copies shall contain notice of copyright in accordance with sections 10, 19, and 20 of this title and if ad interim copyright in said work shall have been obtained pursuant to section 22 of this title prior to the importation into the United States of any copy except those permitted

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[30] The phrase "or periodical" was added by the Act June 3, 1949.

§ 19. Notice; form[33]

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[33] This was § 18 of the 1909 Act. The 1947 codification derives from both the 1909 Act and the Act of June 18, 1874, ch. 301, § 1, 13 Stat. 78. The 1874 version read as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no persons shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page or the page immediately following, if it be a book; or if a map, chart, musicial composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some visible portion thereof, or of the substance on which the name shall be mounted, the following words, viz: "Entered according to act of Congress, in the year _____, by A. B., in the office of the Librarian of Congress, at Washington"; or, at his option the word "Copyright," together with the year the copyright was entered, and the name of the party by whom it was taken out; thus–"Copyright 18–, by A. B."

The 1909 Act read as follows:

That the notice of copyright required by section nine of this Act shall consist either of the word "Copywright" or the abbreviation "Copr.", accompanied by the name of the copyright proprietor, and if the work be a printed literary, musicial, or dramatic work, the notice shall include also the year in which the copyright was secured by publication. In the case, however, of copies of works specified in subsections (f) to (k), inclusive, of section five of this Act, the notice may consist of the letter C inclosed within a circle, thus: ©, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor: *Provided,* That on some accessible portion of such copies or of the margin, back, permanent base, or pedastal, or of the substance on which such copies shall be mounted, his name shall appear. But in the case of works in which copyright is subsisting when this Act shall go into effect, the notice of copyright may be either in one of the forms prescribed herein or in one of those prescribed by the Act of June eigtheenth, eighteen hundred and seventy-four.

The 1947 codification had the following version:

NOTICE; FORM.–The notice of copyright required by section 10 of this title shall consist either of the work "Copyright" or the abbreviation "Copr.", accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication. In the case, however, of copies of works specified in subsections (f) to (k), inclusive, of section 5 of this title, the notice may consist of the letter C

The notice of copyright required by section 10 of this title shall consist either of the word "Copyright", the abbreviation "Copr.", or the symbol ©, accompanied by the name of the copyright

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enclosed within a circle, thus ©, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor: *Provided,* That on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear. But in the case of works in which copyright was subsisting on July 1, 1909, the notice of copyright may be either in one of the forms prescirbed herein or may consist of the following words: "Entered according to Act of Congress, in the year _____, by A. B., in the office of the Librarian of Congress, at Washington"; or, at his option, the word "Copyright", together win the year the copyright was entered and the name of the party by whom it was taken out; thus, "Copyright, 19___, by A. B."

In 1954, this section was amended to bring it into conformity with the Universal Copyright Convention, allowing authors or publishers to use the symbol © as an alternative statutory copyright notice in the works of all classes:

The notice of copyright required by section 10 of this title shall consist either of the word "Copyright", the abbreviation "Copr.", or the symbol © accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication. In the case, however, of copies of works specified in subsections (f) to (k), inclusive, of section 5 of this title, the notice may consist of the letter C enclosed within a circle, thus ©, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor: *Provided,* That on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear. But in the case of works in which copyright was subsisting on July 1, 1909, the notice of copyright may be either in one of the forms prescribed herein or may consist of the following words: "Entered according to Act of Congress, in the year _____, by A. B., in the office of the Librarian of Congress, at Washington, D. C.,"; or, at his option, the word "Copyright", together with the year the copyright was entered and the name of the party by whom it was taken out; thus, "Copyright, 19___, by A. B."

This section became effective September 16, 1955.

The current text reflects the 1971 Amendment in the form of notice to be used in sound recordings, and became effective February 15, 1972. See ¶ 5(n) *supra.*

proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication. In the case, however, of copies of works specified in subsections (f) to (k), inclusive, of section 5 of this title, the notice may consist of the letter C enclosed within a circle, thus ©, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor: *Provided,* That on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear. But in the case of works in which copyright was subsisting on July 1, 1909, the notice of copyright may be either in one of the forms prescribed herein or may consist of the following words: "Entered according to Act of Congress, in the year _____, by A. B., in the office of the Librarian of Congress, at Washington, D. C.,"; or, at his option, the word "Copyright," together with the year the copyright was entered and the name of the party by whom it was taken out; thus, "Copyright, 19___, by A. B."

In the case of reproductions of works specified in subsection (n) of section 5 of this title, the notice shall consist of the symbol ℗ (the letter P in a circle), the year of first publication of the sound recording, and the name of the owner of the copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner: *Provided,* That if the producer of the sound recording is named on the labels or containers of the reproduction, and if no other name on the labels or containers of the reproduction, and if no other name appears in conjunction with the notice, his name shall be considered a part of the notice.

(Amended July 30, 1947, ch. 391, 61 Stat. 658; August 31, 1954, ch. 1161, § 3, 68 Stat. 1032; October 15, 1971, Pub. L. 92-140, § 1(c), 85 Stat. 391.)

§ 20. Same; place of application of; one notice in each volume or number of newspaper or periodical[34]

The notice of copyright shall be applied, in the case of a book or other printed publication, upon its title page or the page immediately following, or if a periodical either upon the title page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title page or the first page of music, or if a sound recording on the surface of reproductions thereof or on the label or container in such manner and location as to give reasonable notice of the claim of copyright.

* * *

printing of the copyright notice shall have been duly complied with, the copyright shall be extended to endure in such book or periodical for the term provided in this title.

(Amended July 30, 1947, ch. 391, 61 Stat. 659; June 3, 1949, ch. 171, § 3, 63 Stat. 154.)

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[34] Section 20 as amended by the Act of October 15, 1971, 85 Stat. 391, effective February 15, 1972. See Sec. 5(n), n.11, *supra*. This was § 19 of the 1909 Act, which read as follows:

That the notice of copyright shall be applied, in the case of a book or other printed publication, upon its title-page or the page immediately following, or if a periodical either upon the title-page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title-page or the first page of music: *Provided*, That one notice of copyright in each volume or in each number of a newspaper or periodical published shall suffice.

The 1971 amendment provided for the location of the notice on a sound recording.

§ 24. Duration; renewal and extension[38]

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[38] This section combined §§ 23 and 24 of the 1909 Act which read as follows:

Sec. 23. That the copyright secured by this Act shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided,* That in the case of any posthumous work or of any periodical, cyclopaedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopaedic or other composite work when such contribution has been separately registered, the author of such work, if still living, or the widow, or widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

Sec. 24. That the copyright subsisting in any work at the time when this Act goes into effect may, at the expiration of the term provided for under existing law, be renewed and extended by the author of such work if still living, or the widow, widower, or children of the author, if the author be not living, of if such author, widow, widower, or children be not living, then by the author's executors, or in the absence of a will, his next of kin, for a further period such that the entire term shall be equal to that secured by this Act, including the renewal period: *Provided, however,* That if the word be a composite work upon which copyright was originally secured by the proprietor thereof, then such proprietor shall be entitled to the privilege of renewal and extension granted under this section: *Provided,* That application for such renewal and extension shall be made to the copyright office and duly registered therein within one year prior to

The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided,* That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within

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the expiration of the existing term.

Prior to the 1909 Act, R.S. 4953 (July 8, 1870, ch. 230, § 87, 16 Stat. 212) provided for a 28 year term for copyright "from the time of the recording of the title thereof," while R.S. 4954 provided for an exclusive right for a 14 year renewal term for the "author, inventor, or designer. . .or his widow or children. . ."

The first Copyright Act May 31, 1790, ch. 18, 1 Stat. 124 provided for a 14 year copyright term and a 14 year renewal term. The Act of February 3, 1831, ch. 16, 4 Stat. 436, increased the original term to 28 years but maintained the renewal term at 14 years.

The Act of March 15, 1940 (ch. 57, 54 Stat. 51) revised the text of § 23 by deleting the following words from the second proviso clause: "when such contribution has been separately registered." The present text is that of the 1947 codification.

With the prospect of a new revision of the copyright law at hand, Congress passed a number of laws which had the effect of extending the renewal terms of copyrights subsisting after September 19, 1962 or prior to December 31, 1971 until December 31, 1976; Pub. L. 87-668, September 19, 1962, 76 Stat. 556; Pub. L. 89-142, August 28, 1965, 79 Stat. 581; Pub. L. 90-141, November 16, 1967, 81 Stat. 464; Pub. L. 90-416, July 23, 1968, 82 Stat. 397, Pub. L. 91-147, December 16, 1969, 83 Stat. 260; Pub. L. 91-555, December 17, 1970, 84 Stat. 1441; Pub. L. 92-170, November 24, 1971, 85 Stat. 490; Pub. L. 92-566, § 1, October 25, 1972, 86 Stat. 1181; Pub. L. 93-573, title I, § 104, December 31, 1974, 88 Stat. 1873. See Appendix 8 *infra.*

one year prior to the expiration of the original term of copyright: *And provided further,* That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

(Amended March 15, 1940, ch. 57, 54 Stat. 51; July 30, 1947, ch. 391, 61 Stat. 659.)

§ 25. Renewal of copyrights registered in Patent Office under repealed law[39]

Subsisting copyrights originally registered in the Patent Office prior to July 1, 1940, under section 3 of the act of June 18, 1874,[40] shall be subject to renewal in behalf of the proprietor upon application made to the Register of Copyrights within one year prior to the expiration of the original term of twenty-eight years.

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[39] This section was not in the 1909 Act.

[40] This is § 3 of Act June 18, 1874, ch. 301, 18 Stat. 79, which provided that the Commissioner of Patents is "charged with the supervision and control of the entry or registry of such prints or labels."

(Amended July 31, 1939, ch. 396, 53 Stat. 1142; July 30, 1947, ch. 391, 61 Stat. 659.)

§ 26. Terms defined[41]

In the interpretation and construction of this title "the date of publication" shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold,

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[41] This was § 62 of the 1909 Act. It read as follows:

That in the interpretation and construction of this Act "the date of publication" shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority, and the word "author" shall include an employer in the case of works made for hire.

The 1947 codification did not change the text.

Appendix E - Judgment entered February 4, 1999

UNITED STATES COURT OF APPEALS
For the Second Circuit
United States Court House
40 Foley Square
New York 10007

Carolyn Clark Campbell
Clerk

DATE: February 4, 1999

Re: Shoptalk, Ltd. v. Concorde-New Horizon

Docket No(s).: 97-9209

Dear Counsel:

The court has issued its opinion in the above-entitled case, and the decision of the district court has been

AFFIRMED in part, VACATED in part, and REMANDED

Judgment was entered on February 4, 1999, and a mandate will later issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

A copy of the opinion in manuscript form has been forwarded under separate cover,] and you will receive a mailed copy of the printed slip opinion in due course. Additional copies of the slip opinion are available from this office in accordance with Local Rule 0.17 (8).

If you are required by Rule 39 (c) of the Federal Rules of Appelate Procedure to file an itemized and verified bill of cost, you are reminded to do so, with proof of service, within 14 days after entry of judgment.

Very truly yours,

CAROLYN CLARK CAMPBELL, Clerk

By: s/Robert Ross
Robert Ross
Deputy Clerk, USCA

opncvltr frm

UNITED STATES COURT OF APPEALS
For the Second Circuit
United States Court House
40 Foley Square
New York 10007

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 3rd day of February, one thousand nine hundred and ninety-nine.

BEFORE: Hon. Thomas J. Meskill
Hon. Amalya L. Kearse
Circuit Judges
Hon. Michael A. Telesca
Circuit Judge*

Docket Nos. 97-9209, 97-9251

SHOPTALK, LTD., ALAN MENKEN,

Plaintiffs-Counterclaim Defendants-
Appellants-Cross-Appellees,

-v-

CONCORDE-NEW HORIZON CORP.,

Defendant-Counterclaimant-
Appellee-Cross-Appellant.

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* The Honorable Michael A. Telesca, of the United States District Court for the Western District of New York, sitting by designation.

Appeals from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED, and DECREED that the judgment of said district court be and it hereby is affirmed in part, vacated in part, and remanded to said district court for further proceedings in accordance with the opinion of this court. Costs to plaintiff.

FOR THE COURT
Carolyn Clark Campbell, Clerk
By:

s/ Beth J. Meador
Administrative Attorney

U.S. DISTRICT COURT
FILED: MAR , 1999
S. D. OF N. Y.

UNITED STATES COURT OF APPEALS
Filed: FEB 3 1999
Carolyn Clark Campbell, Clerk
SECOND CIRCUIT

A TRUE COPY
CAROLYN CLARK CAMPBELL, CLERK
By: s/Robert Ross
COUNTY CLERK